

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Nancy Zayed,

NO. C 04-01787 JW

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART APPLE'S MOTION
FOR SUMMARY JUDGMENT**

Apple Computers, a corporation doing
business in California; David Black, an
individual,

Defendants.

I. INTRODUCTION

The instant lawsuit arises out of Plaintiff Nancy Zayed's ("Zayed") former employment with Defendant Apple Computers. Defendant David Black is Plaintiff's former supervisor.¹ Zayed essentially contends that she was discriminated against on the basis of her race, national origin, religion, and gender in violation of federal and state law. Presently before the Court is Apple's motion for summary judgment. Based upon all papers filed to date, the Court grants in part and denies in part the motion.

¹ Unless otherwise specified Defendants are collectively referred to as "Apple."

II. BACKGROUND

Zayed is an Egyptian Arab Muslim woman. Apple hired Zayed as an at-will Engineer Scientist II (grade 6) in the Software Operations System (“OS”) division in June 1994. In September 1999, Zayed transferred into the Final Cut Pro (“FCP”) department within the Applications Engineering organization at Apple in a grade 7 engineering position, where she was supervised by Mike Mages (“Mages”). Zayed was responsible for migrating FCP technology to the Macintosh OSX platform. This entailed testing and writing code, which Zayed performed primarily alone. In December of 2000 Mages promoted Zayed to a grade 8 in recognition of her achieving the milestone of migrating FCP to the OSX platform.

After the migration project, however, Zayed’s employment with Apple allegedly dramatically changed. More specifically, Zayed contends that her work environment at Apple changed significantly following the tragic events of September 11, 2001.² For example, Zayed details an instance where her colleague asked her questions about whether the Quoran really instructed Muslims to participate in suicide bombings. On another occasion, one of Zayed's colleagues allegedly stared at her, stormed off, and slammed her door, allegedly because of that colleague's opposition to the war in Iraq. Apple also sent out a group email to the FCP group requesting the citizenship status of each employee to address a copyright issue to which the sender employee had been assigned. Especially disturbing to Zayed was an incident where an employee placed red, white, and blue ribbons outside every employee's office door as a symbol of unity and patriotism. Zayed observed that the ribbons had been placed on everyone's door except her own, and interpreted this as an act to exclude her based on race, ethnicity, and religion.

According to Zayed, from the spring of 2002 to September 28, 2004, she was isolated and marginalized within her practice group; she was denied career opportunities to work on critical projects; and she observed junior and less experienced male Caucasian non-Arab colleagues receive

² Zayed describes several events as indicative to how her work environment changed, but fails to specify when each of these events occurred. For purposes of this motion, the Court assumes that the events occurred shortly after September 11th.

1 premier assignments and quick promotions. Apple contends, however, that as Zayed's performance
2 became more visible to management, it became apparent that Zayed was not completing projects as
3 quickly as expected and did not work well under pressure.

4 During the relevant period, Zayed worked on a project called EDL ("Editor Decision List").
5 EDL is a feature in FCP that allows for the assembly and manipulation of movie footage and
6 cinematic effects within specific frames. According to Zayed, the project was riddled with problems
7 due to the poor quality of the code. Zayed alleges that throughout the project, she communicated
8 regularly and proactively with Apple's Quality Assurance ("QA") team, and never missed a
9 deadline. Zayed further alleges that Mages never raised any performance issues with her.

10 In contrast to Zayed's description of the EDL project, Mages observed problems with
11 Zayed's performance from the start. Mages contends that Zayed's attempts to "fix" problems with
12 the code actually caused additional problems so that the code was worse than it was before Zayed
13 touched it. Mages further contends that Zayed failed to communicate regularly and proactively with
14 Apple's QA team. Mages also observed that Zayed was not well organized and took far longer than
15 other engineers to accomplish her responsibilities. Mages contends that he communicated his
16 concerns to Zayed repeatedly, but felt Zayed was resistant to hearing any type of negative or
17 constructive feedback. Zayed contends that eventually, Mages designated a person by the name of
18 Harrison as lead of the project, even though Zayed had requested the lead role.

19 In spring of 2002, Zayed began reporting directly to Defendant David Black ("Black"). By
20 Zayed's description, she became the subject of unfavorable treatment under Black's management that
21 was directed at her personally. Black allegedly began to observe problems with Zayed's technical
22 skills in late 2002 when Zayed worked on a project involving a videodisc unit feature ("VDU
23 project"). Black contends that even after he explained to Zayed that the entire project depended on
24 her ability to enhance speed and performance, she exhibited an inability to proactively research the
25 underlying technology and innovate solutions for the problems she encountered. Upon realizing the
26 VDU project would not reach its desired result, Zayed allegedly failed to determine how to improve
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1 the feature and failed to communicate for several weeks that she was unable to improve it. As a
2 result, Zayed allegedly missed her deadline for the VDU project and Black eventually stepped in,
3 successfully re-writing the code to make the feature run faster. Zayed alleges she solved problems
4 with the VDU project as they arose, developed the user interface by using existing mechanisms, and
5 followed defined engineering process. Apple contends that even beyond the VDU project, Zayed
6 consistently failed to complete tasks in a timely and efficient manner, and that the delays in Zayed's
7 work forced other engineers to perform unscheduled work in order to salvage projects.

8 Black also allegedly received complaints from other engineers about Zayed. Black observed
9 that Zayed appeared unwilling to acknowledge any problems with her work and reacted angrily and
10 defensively when questioned in peer review meetings. Beginning in 2003, Black repeatedly
11 received complaints from various employees regarding Zayed.³ Specifically, Zayed's colleagues
12 claimed she submitted software claiming it was ready for testing when it was not, and they began to
13 question Zayed's honesty about the status of her work. Zayed was also allegedly unavailable to
14 respond to these issues and questions about her work.

15 On August 23, 2003, Zayed sent Black an email entitled "Future Direction" in which she
16 expressed concern about career development and the fact that colleagues were receiving superior
17 work opportunities in no clear pattern, whereas Zayed was receiving tangential assignments and
18 ones related to technologies at the end of their life cycle. According to Zayed, Black knew that her
19 complaints regarding career development, including the email, consistently related to discrimination
20 and that she was seeking a remedy for the unfair treatment. Zayed states that Black never responded
21 to this email.

22 On December 1, 2003, Zayed received a performance evaluation from Black and Zayed's
23 second-level manager Brett Halle ("Halle"). The evaluation rated Zayed's performance as "needs
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25 ³ One of these employees was QA Manager Eric Lin ("Lin"). Zayed's request for an order striking the
26 declaration of Lin (Docket Item No. 42) is denied. Lin was disclosed as a witness in an interrogatory response as well as
27 during the deposition of Defendant Black. Zayed's request to strike Apple's submission of an unpublished opinion by
28 Judge Hamilton is granted. Zayed's and Apple's respective requests for sanctions are denied.

1 improvement" based on her failure to follow established procedures for the development process;
2 her level of productivity; initiative in resolving development issues; and her failure to assume the
3 responsibility expected of a grade 8 engineer. Black commented that QA staff had been frustrated
4 with Zayed's lack of honesty and adversarial attitude, and stated that her serious performance issues
5 would need to be addressed for her to continue in her then-current position on the FCP team.
6 However, Zayed describes the performance review as comprised of offensive remarks and
7 judgments which failed to be substantiated by Black. Zayed claims that Black yelled at her and
8 pounded on the conference table. Zayed alleges that her evaluation contradicted Apple's policy
9 regarding the review process.

10 Zayed contested her review to HR Manager Heather Ramirez ("Ramirez"), particularly
11 concerned about the "needs improvement" rating and the comments regarding her lack of honesty.
12 Apple contends that at no time while contesting her review did Zayed mention discrimination.
13 Ramirez, Black, and Zayed met to discuss her concerns on December 8, 2003, but Zayed was
14 allegedly unable to specifically refute any statements made in the review. Rather, Zayed allegedly
15 agreed she could attain three of the four areas for development contained in the review, as they were
16 part of her normal work responsibilities. With regard to the fourth goal, Zayed allegedly asked
17 Black how she could enhance her working relationship with QA; Black responded by asking her to
18 work more proactively with QA. Following this meeting, Black changed the wording in the review
19 by removing the "lack of honesty" language, but the overall rating remained the same.

20 On December 12, 2003, Zayed sent an email to Black stating that she contested the review.
21 Zayed claimed:

22 I am getting this negative and biased review in retaliation for my continued
23 documented requests for getting the same chances afforded to other colleagues
(juniors or seniors)...I have not been given my warranted and earned position as well
24 as my merited raises for ethnic, gender, and age reasons.

(Declaration of Jessica Perry in Support of Motion for Summary Judgment ("Perry Decl."), Docket
25 Item No. 33, Exhibit L [December 2003 email].) Zayed informed Ramirez that she would be taking
26 a medical leave of absence.
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1 Also on December 12, 2003, Zayed sent an email to Chief Talent Officer Dan Walker
2 ("Walker") conveying the same information as the previous email to Black. Walker referred the
3 matter to the Employee Relations organization; Apple hired an independent outside consultant,
4 Nancy Dewey ("Dewey") to investigate Zayed's concerns. Dewey did not begin her investigation
5 until Zayed could participate, which was not until she returned from medical leave. On December
6 16, 2003, Zayed filed a discrimination complaint with the EEOC, detailing the allegations of
7 retaliation, hostile work environment, and discrimination she suffered under Black's management.

8 Zayed returned to work in March 2004. Dewey allegedly tried to arrange a meeting with
9 Zayed to investigate her concerns; Zayed refused to attend or provide any additional information,
10 stating that all communications should be directed to her counsel. However, by Zayed's account, she
11 tried to be accommodating and professional, but Dewey did not include her in the investigation.
12 Zayed allegedly suggested that Dewey provide written requests or questions for her to complete. It
13 is undisputed that Zayed was never interviewed. Dewey proceeded with the investigation and
14 concluded that Zayed had not been the subject of discrimination, retaliation, or any other
15 inappropriate conduct.

16 On March 10, 2004, Zayed met with HR Director Judy Goodson ("Goodson"). At this
17 meeting, Zayed allegedly acknowledged that she understood Black's expectations for her and her
18 deadlines. Zayed claims she told Black that if he wanted to communicate with her, it was to be in
19 writing. Apple contends Zayed was continually absent following this meeting, missing at least 13
20 full days over the next two months and some partial days as well. Zayed's absences allegedly
21 resulted in uncompleted assignments which impacted the abilities of other team members to meet
22 their own deadlines. Zayed admits that she did take several sick days. However, she contends that
23 Black assigned her an aggressive schedule, that she met all of her project deadlines, and that she
24 provided weekly status reports as requested.

25 On May 25, 2004, Halle informed Zayed that she would be reassigned to a specific unit test
26 development position in FCP. This position was assigned grade level 7, one grade below Zayed's
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1 previous position. Apple contends this decision was made based upon the needs of the team and
2 done to place Zayed in a position that better matched her skills and experience. While the grade
3 level changed, Zayed's compensation, office assignment, and managerial reporting structure were
4 not affected by her reassignment. Zayed asserts that this reassignment was a demotion in response
5 to her refusal to take a second sick disability leave. In fact, Zayed asserts that Black pressured her to
6 take sick leave by yelling at her in a demeaning and intimidating manner and pounding his fist on
7 the table. Black challenged the legitimacy of Zayed's sick days, and allegedly instituted an
8 attendance policy applicable only to her. Zayed eventually took a second disability leave from June
9 9, 2004 to September 7, 2004.

10 Just before Zayed took the second disability leave, Zayed was told that if she did not accept
11 the new position at grade 7 level, Apple would conclude she was resigning. Zayed refused to accept
12 the position even though she was informed that her salary would not be lowered. Halle reiterated to
13 Zayed that Apple would conclude she was resigning. While Zayed was on her disability leave, she
14 was informed by Goodson that her grade 8 position had been eliminated and the grade 7 position had
15 been filled. Goodson also informed her that she would have three additional weeks to locate another
16 job within Apple once she returned to work. If she could not locate another position, she would be
17 eligible for severance pay. According to Zayed, she was effectively prevented from pursuing typical
18 networking efforts to secure a new job. She was unable to locate another position and her
19 employment was terminated on September 28, 2004. Zayed rejected the severance offer in favor of
20 filing the current lawsuit. She currently works as a Senior Software Engineer at another company,
21 earning 20% more than she earned at Apple.

22 Zayed asserts twelve claims against Apple: (1) race discrimination under 42 U.S.C. § 1981;
23 (2) race discrimination under Title VII; (3) race discrimination under the Fair Employment and
24 Housing Act ("FEHA"); (4) national origin discrimination under FEHA; (5) religious discrimination
25 under FEHA; (6) gender discrimination under FEHA; (7) failure to maintain a harassment-free
26 environment under FEHA; (8) retaliation under FEHA; (9) failure to promote under Title VII and
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1 FEHA; (10) slander; (11) libel; and (12) intentional infliction of emotional distress.

2 III. STANDARDS

3 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and
4 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
5 material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P.
6 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims
7 or defenses." Celotex v. Catrett, 477 U.S. 317, 323-324 (1986).

8 The moving party "always bears the initial responsibility of informing the district court of the
9 basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to
10 interrogatories, and admissions on file, together with the affidavits, if any' which it believes
11 demonstrate the absence of a genuine issue of material fact." Id. at 323. If this burden is met, the
12 moving party is then entitled to judgment as a matter of law when the non-moving party fails to
13 make a sufficient showing on an essential element with respect to which the non-moving party bears
14 the burden of proof at trial. Id. at 322-23.

15 The non-moving party "must set forth specific facts showing that there is a genuine issue for
16 trial." FED. R. CIV. P. 56(e). The non-moving party cannot defeat the moving party's properly
17 supported motion for summary judgment simply by alleging some factual dispute between the
18 parties. To preclude the entry of summary judgment, the non-moving party must bring forth
19 material facts, i.e., "facts that might affect the outcome of the suit under the governing law . . .
20 Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby,
21 Inc., 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there
22 is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio,
23 475 U.S. 574, 586 (1986).

24 The court must draw all reasonable inferences in favor of the non-moving party, including
25 questions of credibility and of the weight to be accorded particular evidence. Masson v. New
26 Yorker Magazine, Inc., 501 U.S. 496, 520 (1991) (citing Anderson, 477 U.S. at 255); Matsushita,

475 U.S. at 588; T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." T.W. Elec. Serv., 809 F.2d at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587.

IV. DISCUSSION

A. Race Discrimination under 42 U.S.C. § 1981, Title VII, and FEHA

Apple addresses Zayed's first three claims for race discrimination collectively. Apple further addresses race discrimination in two parts: discriminatory failure to promote and discrimination with respect to other aspects of Zayed's employment. The Court addresses each argument in turn.

1. Prima Facie Case for Discriminatory Failure to Promote

The analysis for a claim of employment discrimination under FEHA parallels that of Title VII. Levy v. Regents of the Univ. of California, 199 Cal. App. 3d 1334, 1343 (Cal. Ct. App. 1988); see also L.A. County Dept. v. Civil Service Comm'n, 8 Cal. App. 4th 273, 280 (Cal. Ct. App. 1992) (stating that in employment discrimination cases, California courts have frequently adopted the standards used in proving intentional discrimination under Title VII of the Civil Rights Act). To establish a prima facie case of discrimination, the plaintiff must meet following factors: (1) plaintiff is a member of a protected class, (2) plaintiff applied for, but did not receive, the job or promotion in question, (3) a person of comparable qualifications outside the protected class received the position, and (4) plaintiff was qualified for the position. Levy, 199 Cal. App. 3d at 1343-1344.

Apple first contends that it is entitled to summary judgment on the racial discrimination claims because Zayed cannot establish her prima facie case to show discriminatory failure to

1 promote. Specifically, Apple contends that Zayed cannot show she applied for specific promotions
2 nor that she was substantially more qualified for the position sought than the person who received it.
3 ((Defendants' Motion ("Mot."), Docket Item No. 32, at 14:12-26.)

4 Zayed responds by pointing out that the "requisite degree of proof necessary to establish a
5 prima facie case for Title VII...on summary judgment is *minimal* and does not even rise to the level
6 of a preponderance of the evidence." Aragon v. Republic Silver State Disposal Inc., 292 F.3d 654,
7 659 (9th Cir. 2002) (emphasis added) (quoting Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir.
8 1994)). Zayed contends that each element necessary to prove discriminatory failure to promote has
9 been satisfied. With regard to Apple's assertion that she must have applied for specific positions
10 rather than manifested a general interest in being promoted, Zayed claims that she continually
11 applied for positions beginning in 2001. (Plaintiff's Opposition ("Opp'n"), Docket Item No. 46, at
12 18:9-10.) Zayed stated in her deposition:

13 Q: How many engineering manager positions did you actively see in the last two
14 years of your employment within Final Cut Pro?

14 A: I would say three or four.

15 (McCoy Declaration, Docket Item No. 45, Exhibit A [Deposition of Nancy Zayed ("Zayed Dep.") at
16 294:24-295:2.) Zayed also testified at her deposition that she applied for two positions outside of
17 FCP, one in the Quick Time Group and another in the I Photo Group. (Zayed Dep. at 286:21-25 &
18 287:11-13.) The Court finds these statements in Zayed's deposition are sufficient to establish a
19 prima facie case that she applied for but did not receive promotions at Apple.

20 With regard to the third and fourth elements of Zayed's prima facie case, the Court finds
21 Zayed has raised a triable issue of fact regarding whether the persons promoted over her were more
22 qualified than she. Zayed claims that a number of non-Arab, non-Muslim, non-Egyptian males with
23 less experience and less seniority in FCP were promoted during the period she sought and applied
24 for promotions. (Opp'n at 18:15-22.) Specifically, Zayed names David Black, Mike Marinkovich,
25 Pete Steinheuer, and Gio Angelino as persons promoted as engineering managers in FCP during her
26 tenure. (Zayed Dep. at 297:9-24.) Apple points out that Zayed is not aware of the technical or
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1 management background of any persons promoted and thus has no basis for asserting they were less
2 qualified than her. (Mot. at 15:4-6.) However, Zayed does indicate in her deposition that some of
3 the persons promoted during her tenure were hired after her. (Zayed Dep. at 297:9-17.) The Court
4 finds that there is a triable issue of fact regarding whether Zayed was more qualified than the
5 promoted colleagues. Because of her seniority in FCP and past promotions, a reasonable person
6 could find that a discriminatory pattern existed in promoting persons in FCP with less experience
7 than Zayed to managerial positions.

8 2. Discrimination in Zayed's Employment Aside from Failure to Promote

9 With regard to discrimination in other areas of Zayed's employment, Apple characterizes
10 Zayed's claim as consisting of Black failing to allow her to participate in interviews or customer site
11 visits, assigning her tangential projects, and refusing to interact socially with her. (Mot. at 16:20-
12 22.) Apple argues that none of Black's alleged conduct is actionable because it does not constitute
13 substantial or material adverse action taken that affected the terms and conditions of her
14 employment, as required under California law. (Mot. at 16:23-17:11.) Zayed responds that she was
15 singled out for different treatment starting in 2001. Specifically, her supervisors refused to present
16 her with a ten-year anniversary award, as had been given to her male counterparts;
17 that she was excluded from activities and opportunities necessary for advancement that her non-
18 Arab American colleagues participated in. (Opp'n at 23:9-14.) More specifically, Zayed claims that
19 she was deprived of: (1) opportunities to visit customer sites, (2) one-on-one support, and (3)
20 mentoring opportunities, including tutoring in code of the FCP application. Zayed claims that
21 developing expertise in this area is precisely what she needed in order to advance to a managerial
22 position. (Opp'n at 23:19-23.) Moreover, Zayed claims the differing treatment prevented her from
23 receiving proper feedback on her work, placing her at a disadvantage to others in FCP. (Opp'n at
24 23:28-24:2.)

25 The Court agrees with Apple that Black's refusal to interact with Zayed socially cannot
26 constitute an adverse employment action with a substantial and material effect. (See Brooks v. City
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1 of San Mateo, 229 F.3d 917, 929 (9th Cir. 2000) (stating that "[b]ecause an employer cannot force
2 employees to socialize with one another, ostracism suffered at the hands of coworkers cannot
3 constitute an adverse employment action"). Further, the Court finds that the failure of Zayed's
4 supervisors to present her with her ten-year award is not adverse employment action. Zayed does
5 not point to any evidence in the record proving that this event affected the terms or conditions of her
6 employment.

7 However, the Court does not agree with Apple's assertion that an adverse employment action
8 requires a change in pay, benefits, and level of responsibility (Mot. at 17:2-6), nor that Zayed is
9 required to specifically identify customer site visits or interviews from which she was excluded.
10 With regard to the site visits, Zayed testified in her deposition that she would:

11 ask [Black] to take [her] with him on-site visits so [she] would get an exposure to
12 how [their] clients and customers use the application and have a feel for the need and
13 be able to develop better or to suggest features, and [Black] would promise that he
would take [her], and specifically to Disney and Pixar, but he never did, and he would
take Helena [Ju], he would take others.

14 (Zayed Dep. at 91:15-23.) Zayed further testified that Black would give one-on-one support to other
15 colleagues, such as Helena Ju, multiple times per day to show them "how to get things done."

16 (Zayed Dep. at 91:7-12.) Zayed alleges that she would request that Black give her the "same kind of
17 help" as he would for her other colleagues, but he would never follow through on his promises to
18 assist her. (Zayed Dep. at 91:13-15.) At the same time, Zayed's colleagues would allegedly receive
19 mentoring or training in code of the FCP application. She testified that as a result of the
20 opportunities, they would "know the different parts, and the different technologies, how...they make
21 changes." (Zayed Dep. at 80:16-18.)

22 The California Supreme Court has recently stated that "adverse treatment that is reasonably
23 likely to impair a reasonable employee's job performance or prospects for advancement or promotion
24 falls within the reach of the antidiscrimination provisions of [FEHA]." Graves v. Johnson Control
25 World Services, Inc. 2006 WL 618796 (N.D. Cal. 2006) (quoting Yanowitz v. L'Oreal USA, Inc., 36
26 Cal.4th 1028, 1055 (2005). Zayed has raised a triable issue of material fact regarding whether

1 Black's allegedly differential treatment put her at a disadvantaged position in being promoted and
2 constituted an adverse employment action.

3 With regard to the tangential assignments, Apple argues that Zayed cannot show that she
4 received objectively less favorable assignments than her peers and that particular job assignments
5 have no material or substantial adverse effect on her employment. (Mot. at 17:15-17.) On the other
6 hand, Zayed contends that toward the end of her tenure she noticed that younger members of FCP
7 were receiving the types of assignments she had been attempting to get. (Zayed Dep. at 151:2-13.)
8 Specifically, they would receive assignments involving new features and the types of assignments
9 that would "give [them] exposure...[and] add to [their] expertise and...knowledge." (Zayed Dep. at
10 151:7-10.) Whether Zayed's treatment may be perceived as amounting to a change in her level of
11 responsibility and whether it constitutes an adverse employment action are issues that should be
12 decided by a jury. As such, the Court finds that Zayed has established a prima facie case for
13 discriminatory failure to promote.

14 3. Establishing Pretext or Discriminatory Intent

15 Apple argues that even if Zayed could establish a prima facie case for discrimination in
16 failing to be promoted and in other aspects of her employment, she cannot establish that Apple's
17 legitimate reasons for her lack of promotion and treatment are pretextual. (Mot. at 15:17-24 &
18 17:27-18:7.) Apple gives many explanations for Zayed's treatment. With regard to the failure to
19 promote, Apple contends that despite her failure to actually apply for promotions, Zayed was simply
20 not qualified for management positions because of problems with her technical skills,
21 communication, and teamwork. (Mot. at 15:24-27.) In other aspects of Zayed's employment, Black
22 did not invite Zayed on site visits because the customers visited did not have technical issues
23 uniquely related to Zayed's responsibilities. (Declaration of David Black in Support of Motion for
24 Summary Judgment ("Black Decl."), Docket Item No. 36, ¶ 16.) Black also contends that he
25 assigned Zayed to projects that he thought matched her technical skills and expertise. Moreover,
26 Apple argues that Black and Halle, her superiors who gave the negative performance evaluation,
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1 were not aware of Zayed's race, national origin, or religion prior to the lawsuit. (Black Decl. ¶ 31;
2 Declaration of Brett Halle in Support of Motion for Summary Judgment ("Halle Decl."), Docket
3 Item No. 35, ¶ 7; Mot. at 16:6-8 & 18:10-11.)

4 In response, Zayed emphasizes that she personally witnessed other engineers causing bug or
5 software errors that resulted in a delayed project schedule. (Declaration of Nancy Zayed in Support
6 of Opposition to Motion for Summary Judgment ("Zayed Decl."), Docket Item No. 44, ¶¶ 20-21.)

7 While Apple contends that these were problems areas for Zayed, Zayed states that her male,
8 Caucasian, non-Arab engineers causing the same problems were never transferred, demoted, or
9 disciplined as she was. (Zayed Decl. ¶ 21.) Furthermore, Zayed contends that none of her projects
10 fell behind schedule due to any bug or software errors attributable to code she authorized. (Zayed
11 Decl. ¶¶ 15-18, 20.) Zayed also contends that Apple cannot justify its treatment of her by stating
12 that she finished projects of poor quality because many of the projects assigned to her were filled
13 with bugs and of poor quality at the outset, such that no other person wanted to work on them.
14 (Zayed Dep. at 99:4-6; Opp'n at 20:3-5.)

15 Zayed also disputes Apple's contention that Black and Halle were not aware of her race prior
16 to the filing of this lawsuit. First, Zayed points out that she was originally recruited as an Arabic
17 localizer at Apple, and that her personnel file would have disclosed this. (Zayed Dep. at 50:3-9.)
18 Second, she points out that her appearance and name are non-white (Zayed Decl. ¶ 48; Opp'n at
19 21:17-18.) Third, Zayed stated in her deposition that it was "common knowledge" among her
20 supervisors, including Black, Mages, Harrison, and Halle, that she traveled each year to Egypt to see
21 family. (Zayed Decl. ¶ 24.) In one instance, Harrison was instructed by HR to speak to Zayed
22 concerning potential problems that might arise with regard to Zayed's ethnicity shortly after
23 September 11, 2001. (Zayed Dep. at 37:9-14.) Harrison also made an international long distance
24 call to Zayed while on one of her annual vacations to Egypt. (Zayed Decl. ¶ 25.) The Court finds
25 that Zayed has produced enough evidence from which a jury could find that Apple and Zayed's
26 supervisors knew of her race.

1 In sum, the Court denies Apple's motion for summary judgment with regard to her first three
2 claims alleging racial discrimination. Zayed has produced sufficient evidence to establish her prima
3 facie case, and raised genuine issues of material fact as to whether Apple's explanations are
4 pretextual.

5 B. Discrimination on the Basis of National Origin and Religion under FEHA

6 Apple's arguments with regard to Zayed's claims of discrimination on the basis of national
7 origin and religion are essentially identical to those made against the racial discrimination claims.
8 For the reasons set forth above in Section A, the Court denies Apple's motion for summary judgment
9 with regard to these claims.

10 C. Gender Discrimination under FEHA

11 With regard to gender discrimination, Apple again repeats its argument made in support of
12 granting summary judgment for race discrimination. However, Apple also argues that this claim
13 fails because Zayed admitted that Helena Ju, a female colleague, received the developmental
14 opportunities that Zayed alleges she was denied. (Mot. at 19:23-25.) Because the alleged lack of
15 developmental opportunities is not the sole basis of Zayed's discrimination claim and for the reasons
16 set forth in Section A, the Court denies Apple's motion for summary judgment with regard to the
17 gender discrimination claim.

18 D. Failure to Promote Claim

19 Apple contends that Zayed's failure to promote claim must fail, as it is duplicative of the
20 discrimination claims. As stated in Section A, the Court finds that Zayed has established her prima
21 facie case with regard to discriminatory failure to promote. The Court denies Apple's motion for
22 summary judgment on this claim.

23 E. Retaliation

24 To establish a prima facie case of retaliation under FEHA, the plaintiff must show: (1) he or
25 she engaged in protected activity, (2) the employer subjected the plaintiff to an adverse employment
26 action, and (3) there exists a causal link between the protected activity and the adverse employment
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1 action. Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028, 1042 (2005). Apple contends that Zayed's
2 claim fails because she cannot establish any of the three elements.

3 According to Apple, the August 2003 email to Black was not a protected activity under Cal.
4 Gov't Code § 12940(f). (Mot. at 20:20-21.) In addition, Apple contends the negative performance
5 evaluation and reassignment that occurred after she sent the email do not rise to the level of an
6 adverse employment action that had a substantial and material effect on the terms and conditions of
7 her employment. With regard to the last element, Apple contends that there is no causal connection
8 because too much time lapsed between both the August and December 2003 emails and the allegedly
9 adverse actions. (Mot. at 22:22-24.) Apple also argues that there are legitimate reasons for the
10 changes in her employment after the email, and that Zayed cannot establish pretext and retaliatory
11 motive. (Mot. at 23:18-19.)

12 Zayed responds by pointing to three separate occasions in which she raised the issue of
13 discrimination to Apple: (1) the August 2003 email, (2) the EEOC complaint filed in December
14 2004, and (3) the present lawsuit filed in May 2004. (Opp'n at 24:14-18.) Zayed argues that Apple's
15 adverse action consisted of the negative performance review at her next scheduled review, four
16 months after the August 2003 email; her subsequent demotion in May 2004; and termination in
17 September 2004. (Opp'n at 24:28-25:3.) Zayed seeks to establish causation between the protected
18 activity and adverse action with circumstantial evidence, emphasizing that her negative evaluation
19 arose at the first scheduled performance review four months later. (Opp'n at 25:4-13.) In
20 responding to Apple's assertions regarding pretext, Zayed argues that proximity in time helps
21 support the existence of pretext. Further, Zayed argues that Apple cannot substantiate its claims that
22 Zayed lacked technical skill, and that Apple failed to follow its own policies concerning discipline
23 and employee reviews. (Opp'n at 26:11-15.)

24 1. Zayed's August 2003 Email

25 Apple argues that Zayed's August 2003 email was not a protected activity because it did not
26 mention discrimination. (Mot. at 21:15-17.) On the other hand, Zayed contends that "there was no
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1 question that Black knew [her] complaints had been consistently related to discrimination, and that
2 [she] was seeking a remedy for [her] unfair treatment." (Zayed Decl. ¶ 28.) Zayed also stated that
3 with regard to the numerous times she spoke with Black and Mages about her career development
4 and future at Apple:

5 When I expressed my concern that I was being treated unfairly regarding assignments
6 and promotions, I understood these conversations to be about the disparity between
7 my experience as an Egyptian, Arab, Muslim, woman, and the opportunities that were
8 being handed out to my male, Caucasian, non-Arab colleagues in no discernable
9 pattern. As a result of these conversations, I felt an increasing hostility directed at me
10 because of my race, gender, nationality, and religion.

11 (Zayed Decl. ¶ 26.)

12 The Court is not persuaded by Zayed's argument that the August 2003 email could
13 reasonably be construed as protected activity relating to her allegations of discrimination. In
14 examining the email, Zayed refers to her career development, the tangential assignments given to her
15 compared to her colleagues' opportunities, and overall low job satisfaction. (Perry Decl., Exhibit I
16 [August 2003 email].) The Court recognizes that this email may have contained an implicit
17 reference to discrimination, but without any specific language complaining of discrimination the
18 email is nothing more than a complaint about unfair treatment. The Ninth Circuit has stated that an
19 employee's statement cannot be opposed to an unlawful employment practice unless it "refers to
20 *some* practice by the employer that is allegedly unlawful." EEOC v. Crown Zellerbach Corp., 720
21 F.2d 1008, 1013 (9th Cir. 1983). The Third Circuit has also adopted a similar rationale regarding
22 how specific an employee's opposition must be to support a prima facie case of retaliation. In
23 Barber v. CSX Distrib. Serv., 68 F.3d 694, 701-702 (3d Cir. 1995), the Court held that plaintiff's
24 letter could not constitute the requisite protected conduct for a prima facie case of retaliation when
25 the letter merely complained about unfair treatment in general, without specifically complaining
26 about age discrimination, and expressed dissatisfaction with the fact that another employee received
27 the promotion in question.

28 To the extent that Apple's motion contests Zayed's claim of retaliation for writing the August
2003 email to Black entitled "Future Direction," the Court grants Apple's summary judgment motion

1 because this email cannot reasonably be construed as protected activity.

2 2. Zayed's December 2003 Email

3 Apple contends it could not have retaliated for the email sent to Black following Zayed's
4 negative performance evaluation because the allegedly adverse action occurred too far after the
5 allegedly protected activity. (Mot. at 22:22-23:2.) In the December email, Zayed contested the
6 negative performance evaluation given earlier that month and stated that she believed she "ha[d] not
7 been given [her] warranted and earned position as well as [her] merited raises for ethnic, gender, and
8 age reasons." (Perry Decl., Exhibit L [December 2003 email].) Unlike the previous email, the Court
9 finds this email is sufficiently specific to be an opposition to an unlawful employment practice.

10 With regard to adverse action and pretext, Apple makes parallel arguments to those made
11 against the claims for race discrimination. For the reasons listed above in Section A, the Court finds
12 that there is a triable issue of fact regarding whether Zayed suffered an adverse employment action
13 after the December 2003 email, and whether Apple's legitimate explanations for her treatment are
14 pretext.

15 The Court further finds that the length of time between the December 2003 email and
16 Zayed's reassignment in May 2004 were sufficiently close in time to support her prima facie case of
17 retaliation. Apple cites many cases outside the Ninth Circuit for the proposition that mere temporal
18 proximity cannot support causation unless the two events are very close in time. (See Mot. at 23:1-
19 14.) However, the Ninth Circuit has not adopted a bright line rule regarding how much time will
20 permit an inference of causation. See Bell v. Clackamas County, 341 F.3d 858, 865 (9th Cir. 2003).
21 This Court finds the time between protected activity and the allegedly adverse action are sufficiently
22 close such that a jury may find that Zayed's reassignment and other treatment were in retaliation for
23 her December 2003 email. Insofar as Apple argues that summary judgment is appropriate regarding
24 retaliation for the December 2003 email, the Court denies Apple's motion.

25 3. Zayed's Lawsuit

26 Zayed filed the instant lawsuit in May 2004. Shortly thereafter, she was allegedly subjected
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1 to an adverse employment action: on May 25, 2004, she was reassigned to a specific unit test
2 development position in FCP, which was one grade level lower than her previous position.
3 Ultimately, she was terminated on September 28, 2004. This evidence is sufficient to raise a triable
4 issue of fact.

5 F. Failure to Prevent Harassment Claim

6 Apple contends that Zayed's claim for failure to prevent harassment must fail because she
7 cannot state an underlying claim for either harassment or discrimination. (Mot. at 24:23-25:3.)
8 Apple contends that "[a]n employer that maintains policies and undertakes affirmative programs to
9 prevent discrimination cannot be liable for failure to prevent discrimination under FEHA." (Mot. at
10 25:5-6.)

11 While the Court acknowledges that Apple has implemented policies to prevent
12 discrimination and makes no determination as to the reasonableness of these policies, the claim for
13 failure to prevent harassment should not be dismissed on summary judgment because this Court has
14 found the underlying discrimination should proceed. This result is supported by the cases cited by
15 Apple in its motion for the proposition that Apple's reasonable measures to prevent discrimination
16 prohibit a finding of liability for failure to prevent. (See Mot. at 25:4-16.) Apple cited cases in
17 which each court granted summary judgment on the failure to prevent claims when it also dismissed
18 the underlying discrimination or harassment claim. Because there is a triable issue of fact regarding
19 whether Apple discriminated against Zayed, the Court finds a genuine issue of fact exists regarding
20 Apple's alleged failure to prevent.

21 G. Defamation

22 To prevail on a claim of defamation in California, the plaintiff must show an intentional
23 publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or
24 which causes special damage. Smith v. Maldonado, 72 Cal. App. 4th 637, 645 (Cal. Ct. App. 1999).
25 Zayed's claims of slander and libel are comprised of two statements in her performance evaluation:
26 one statement describes her as having an adversarial attitude that annoyed and disrupted team
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1 members' work, and the other statement describes her as dishonest. (Mot. at 26:11-15; Perry Decl.,
2 Exhibit J [Performance Evaluation].) Apple contends the statements are not actionable for four
3 independent reasons. First, Apple cites to black letter law that "unless an employer's performance
4 evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty,
5 incompetence or reprehensible personal characteristics or behavior," it cannot be defamation.
6 Jensen v. Hewlett-Packard Co., 14 Cal. App. 4th 958, 965 (Cal. Ct. App. 1993). Apple argues that
7 remarks about Zayed's adversarial attitude and being annoying do not meet this standard. (Mot. at
8 27:1-2.) Second, Apple contends that there is no publication beyond Zayed's managers and HR to
9 satisfy the prima facie case. Third, Apple contends the statements are privileged because they were
10 made in the context of a performance evaluation and are just opinions. (Mot. at 27:9-10, 27:26-28,
11 & 28:9-10.) Fourth, Apple contends the statements were true, and that truth is an absolute defense to
12 defamation. (Mot. at 28:25-29:2.)

13 Zayed responds by arguing that the statements were defamatory as a matter of law for two
14 reasons: first, statements which call into question plaintiff's integrity are clearly defamatory, and
15 second, the "lack of honesty" statement was a statement of fact. (Opp'n at 29:9-17.) Zayed argues
16 that the statements were not mere recitations of someone's feelings and were not preceded by any
17 statement qualifying or limiting the statement as QA's opinion. (Opp'n at 29:15-19.) With regard to
18 whether the statements were privileged, Zayed claims that Apple mischaracterizes the number of
19 people to whom the statement was published. (Opp'n at 30:2-3.) Zayed points out that oral
20 communications surround personnel reviews and that these reviews are reviewed by other persons in
21 the company. Zayed also believes that this performance review may have been read or discussed
22 with other departments of Apple, to whom Zayed applied for a position but was denied. (Opp'n at
23 30:6-7.)

24 The Court is persuaded by Apple's arguments that Zayed's defamation claim cannot survive
25 summary judgment. California courts have strongly disfavored libel suits based on employee
26 communications in employee performance reviews. See Jensen v. Hewlett-Packard Co., 14 Cal.

1 App. 4th 958, 964 (Cal. Ct. App. 1993) (stating that evaluations serve the important business
2 purpose of documenting the employer's hiring, promotion, discipline and firing practices, and serve
3 as a vehicle for informing the employee of what management expects, how the employee measures
4 up, and what must be done to obtain wage increases, promotions, and other recognition).

5 The statements in the performance evaluation are clearly opinion and not defamatory as a
6 matter of law. Furthermore, to the extent that the statements question Zayed's integrity and honesty,
7 the Court finds that the statements were privileged and were made in the course of communications
8 intended to better Zayed and Apple's working relationship. See Cuenca v. Safeway San Francisco
9 Employees Fed. Credit Union, 180 Cal. App. 3d 985, 996 (stating that "[c]ommunications made in a
10 commercial setting relating to the conduct of an employee have been held to fall squarely within the
11 qualified privilege for communications to interested persons," defined as a recipient with a common
12 interest); see also Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 615 (stating the qualified
13 privilege defense to defamation arises from the "necessity for full and unrestricted communication
14 on matters in which the parties have a common interest or duty").

15 Further, there is no evidence that Apple published the allegedly defamatory statements. The
16 only persons who learned of the statements did so in the course of their employment at Apple, and
17 the persons who may not have learned of the statements in the course of performing their duties were
18 informed by Zayed herself. Zayed does not substantiate her claim that employees in other
19 departments at Apple learned of the statement, and merely concludes that the reason Zayed did not
20 find another job within Apple must have been these allegedly defamatory statements. The Court
21 also notes that Zayed was able to find another position outside of Apple following her termination;
22 there is no basis to believe that anyone other than the persons Zayed told knew about the evaluation.

23 For the reasons listed above, the Court grants Apple's motion for summary judgment on the
24 defamation claims.

25 H. Intentional Infliction of Emotional Distress

26 In order to prevail in the claim for intentional infliction of emotional distress ("IIED"), Zayed
27 must prove that the conduct was extreme and outrageous. Yurick v. Superior Court, 209 Cal. App.

1 3d 1116, 1123 (Cal. Ct. App. 1989). The conduct must be "so extreme as to exceed all bounds of
2 that usually tolerated in a civilized community. Cervantez v. J.C. Penny Co., 24 Cal.3d 579, 593
3 (1979).

4 Because the Court is permitting the discrimination and a portion of the retaliation claims to
5 proceed, the Court denies summary judgment on the IIED claim as well.

6 V. CONCLUSION

7 For the reasons set forth above, Apple's motion for summary judgment is granted in part and
8 denied in part. Specifically, the Court denies Apple's motion for summary judgment on the
9 following claims: discrimination based on race, national origin, religion, and gender; failure to
10 prevent harassment; failure to promote; and IIED. With regard to the retaliation claim, the Court
11 grants summary adjudication that there was no actionable retaliation as a result of Zayed's August
12 2003 email, but finds that there are genuine issues of fact regarding whether Zayed retaliated after
13 Zayed sent the December 2003 email and after Zayed filed the instant lawsuit. The Court grants
14 summary judgment on the defamation claims for slander and libel. Lastly, Apple's "Motion For
15 Sanctions, And Objecting To Evidence And Moving To Strike Evidence Submitted By Plaintiff
16 Nancy Zayed In Opposition To Defendants' Motion for Summary Judgment" is denied.

17 Dated: April 4, 2006

18 04cv1787sj

/s/James Ware

JAMES WARE

United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

2 Jessica Perry jperry@orrick.com

3 Joseph Liburt jliburt@orrick.com

4 Waukeen Q McCoy mccoyslawsf@yahoo.com

5 **Dated: April 5, 2006**

Richard W. Wieking, Clerk

6
7 **By: /s/JW Chambers**
8 **Melissa Peralta**
9 **Courtroom Deputy**
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